

CRIMINAL YEAR SEMINAR

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March 19, 2010 - Phoenix, Arizona
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2010 CRIMINAL RULES UPDATE

Presented By:

JUDGE MICHAEL JONES

Maricopa County Superior Court
Phoenix, Arizona

Distributed By:

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2010 Criminal Rules Update

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Rule 1.3 Computation of time

State v. Lychwick, 222 Ariz. 604, 218 P.3d 1061 (Ct. App. 2009).

Defendant was charged with Agg Harassment for violating Inj Against Harassment exactly one year from the date of its issuance— Def contended that Inj had expired when he contacted victim on 1/17/07; Defendant was served at 11:00 am on 1/17/06.

- Inj expires one year after date of service
- Date of service is excluded
- Include last day: "...law takes no notice of fractions of a day...."
- Defendant was served at 11:00 am on 1/17/06, so Injunction expires at the end of the day on 1/17/07.

Rules 1.6(a) and 26.9

Defendant's presence at sentencing

State v. Forte, 222 Ariz. 389, 214 P.3d 1030 (Ct. App. 2009).

- Defendant's 'virtual presence' at felony sentencing by interactive audiovisual system is error.
- However, Defendant failed to object
- Court reviewed for fundamental error & found no prejudice to Defendant-- affirmed

Rule 1.6 Audio-visual systems

Rule change, effective 1/1/10

- Use is precluded, except where extraordinary circumstances & both parties' consent:
 1. Trial
 2. Probation violation proceedings
 3. Felony sentencing
 4. Felony probation disposition

Rule 1.6 Audio-visual systems

Rule change, effective 1/1/10

- Use is permissible without parties' consent in discretion of the court:
 1. Initial Appearance
 2. Misdemeanor not guilty or guilty plea
 3. Hearing on Motion to Continue not involving exclusion of time under Rule 8
 4. Hearing on an uncontested motion
 5. Pretrial or status conference
 6. Misdemeanor COP
 7. Informal Rule 32 conference

Rule 1.6 Audio-visual systems

Rule change, effective 1/1/10

- Before accepting parties' consent, the court must determine that Defendant's consent is knowingly, intelligently & voluntarily given
- Audio-visual system requirements:
 1. All parties may view & converse simultaneously
 2. Ability to make a full record
 3. Ability for confidential communications between Defendant & Defense counsel before, during & after proceeding
 4. Provisions for interpreter services, when necessary
 5. Provisions for the public to view the proceedings
 6. Note that victim's rights already part of the existing rule & not affected by the amendments

Rules 3.2, 4.2 and 26.10

Rule changes, effective 1/1/10

- Ten-print fingerprints required for law enforcement purposes;
- R. index fingerprint on court documents

Rules 6.1 and 8

Right of counsel- continuance

State v. Aragon, 221 Ariz. 88, 210 P.3d 1259 (Ct. App. 2009).

- An aggravated DUI case
- Trial judge erred in denying appointed counsel's motion to continue trial (filed 6 days before trial date) to enable retained counsel to file notice of appearance and prep for trial.
- An "unreasoning & arbitrary' adherence to its schedule w/out due regard for... legitimate request to exercise his right to the counsel of his choice."

Rule 6.1-- recap

Conflict/ new counsel/ Moody

Recap of Arizona law summarized in State v. Moody, 192 Ariz. 505, 968 P.2d 578 (1998):

- Defendant's 6th Amendment right to representation by competent counsel, but
 - not entitled to counsel of own choice
 - not entitled to 'meaningful relationship' w/ counsel
- Judge must hold hearing when Defendant requests new counsel or alleges conflict.

Rule 6.1-- recap

Conflict/ new counsel/ Moody

- Moody factors:
 - Irreconcilable conflict exists
 - Whether new counsel would be confronted with same conflict
 - Timing of Defendant's motion or request
 - Inconvenience to witnesses
 - Time between offense & trial
 - Proclivity of Defendant to request new counsel
 - Quality of counsel
- Where record is silent, the court presumes the trial judge made all the requisite Moody findings, that is, considered all Moody factors (Peralta, *infra*.)

Rule 6.1-- recap Conflict/ new counsel

- State v. Torres, 208 Ariz. 340, 93 P.3d 1056 (2004): burden is on Defendant to prove *genuine irreconcilable difference* or *total breakdown in communication*.
- State v. Paris-Sheldon, 214 Ariz. 500, 154 P.3d 1046 (Ct. App. 2007): burden is on Defendant to prove *severe & pervasive conflict w/ atty*, or that contact was so minimal *meaningful communication was not possible*.

Rule 6.1 Conflict/ new counsel

State v. Peralta, 221 Ariz. 319, 212 P.3d 51 (Ct. App. 2009).

- Trial judge need not address all Moody factors on record- where record is silent, the court presumes the trial judge made all the requisite Moody findings, that is, considered all Moody factors.
- Peralta abruptly left meetings with counsel because he wanted to dictate trial strategy, made unreasonable demands on counsel regarding strategy and the plea offer.
- Where Defendant is the cause of the damage (fracture) of the attorney-client relationship, the courts deny relief.

Rule 6.1

Conflict/ new counsel

State v. Moore, 222 Ariz. 1, 213 P.3d 150 (2009).

- No actual conflict where (in capital sentencing trial) Defense counsel's office had previously represented victim. Victim's proposed testimony about 'residual doubt' at sentencing was not admissible.
- Defendant's desire to present inadmissible evidence contrary to counsel's trial strategy (that he had passed a polygraph) not a conflict of interest.

Rule 6.1

Conflict/ new counsel

State v. Dann, 220 Ariz. 351, 207 P.3d 604 (2009).

- Trial judge appointed former trial counsel as advisory counsel after the Defendant waived counsel (and the court completed a full hearing).
- No conflict between trial counsel and Defendant though Defendant claimed the mere presence of counsel "affected Dann's ability to decide which arguments to make to support his claims of innocence."

Rule 6.3 Duties of Counsel

Rule changes, effective 1/1/10

- New sections (d) and (e):
- (d) duty of Defense Counsel in a capital case to maintain/preserve the file “in a manner that will inform successor counsel of all significant developments...” and to preserve “all information regarding every aspect of the representation....”
- (e) duty of successor counsel in a capital case to collect the file from previous counsel and to maintain the file in accord with paragraph (d) above.

Rule 7.3

State v. Donahoe, 220 Ariz. 126, 203 P.3d 1186 (Ct. App. 2009).

- Cash-only bond set at \$100,000. Defense counsel attempted to post with cash in small denominations bound in duct tape.
- In assessing whether the Defendant poses a flight risk if released on bail under Rule 7.3, the court may enquire as to the source of the posted security.

Rule 10.2 Change of Judge

Campbell v. Barton, 222 Ariz. 414, 215 P.3d 388 (Ct. App. 2009).

- Defendant filed a second notice of change of judge after State filed Notice of Intent to Seek Death Penalty
- Held, Rule 10.2 provides for change of judge after the D.P. Notice- here a second change of judge– reversed & remanded

Rule 10.3 Change of Venue

State v. Kiles, 222 Ariz. 25, 213 P.3d 174 (2009).

- 3 victims killed in 1989 in Yuma; in 2000 Kiles 2nd jury trial in Yuma County- Kiles contended 10 years of bad publicity, 99 newspaper articles
- Kiles did not allege actual prejudice; claimed media coverage was “outrageous” & created a “carnival-like” atmosphere
- State v. Schmid, 109 Ariz. 349, 509 P.2d 619 (1973), does not stand for proposition that automatic change of venue is required when media publishes sensitive details about: guilt/innocence, confessions, or identity & credibility of witnesses.

Rule 11

State v. Silva, 222 Ariz. 457, 216 P.3d 1203 (Ct. App. 2009).

- By end of third restoration to competency period, defendant had endured more than 32 months of treatment; however, no period of restoration had exceeded the 21 months.
- Court did not lose jurisdiction to determine competency when collective period of restoration exceeded 32 months.

Rule 11.5

Rule change, effective 9/30/09

(e) Calculation of time. The court shall only consider the time a defendant actually spends in a restoration to competency program when calculating the time requirements pursuant to ... A.R.S. §13-4515 (21 months or max sentence possible, whichever is lesser).

This is in response to Nowell v. Rees, 219 Ariz. 399, 199 P.3d 654 (Ct. App. 2008). Nowell was ordered released & charges dismissed where he only participated in 8 months of restoration treatment at ASH. Nowell spent the remainder of the 21 months filing special actions and other legal proceedings challenging his detention and competency!

Rule 12.9

Grand Jury challenges

Francis v. Sanders, 222 Ariz. 423, 215 P.3d 397 (Ct. App. 2009).

- Defendant charged w/ 7 counts Att. Trafficking in Stolen Property
- Grand Juror asked, "Is this entrapment?" Prosecutor misstated elements of entrapment (there is no 'coercion element') & informed jurors that they need not concern themselves because coercion was a defense for trial.
- Prosecutor's duty to present 'clearly exculpatory' evidence includes evidence that supports an affirmative defense, such as entrapment.
- Special Action relief granted: REVERSED, and remanded for new finding of probable cause.

Rule 13.1

Information

State v. Maldonado, ___ Ariz. ___, ___ P.3d ___, 573 Ariz. Adv. Rep. 8 (2010).

- Defendant charged w/ Poss of Cocaine; ME shows information filed, information was read to trial jurors; however, no information was in court's file— prosecutor filed 13 mo after trial.
- Failure to timely file information did not deprive Superior Court of jurisdiction, overruling State v. Smith(1948) & Paxton v. Walters(1951).
- Information was, most likely, mis-filed by clerk!!

Rule 13.2

Lesser included offenses

State v. Larson, 222 Ariz. 341, 214 P.3d 429 (Ct. App. 2009).

- Sexual Conduct w/ a Minor is not lesser included offense of Continuous Sexual Abuse of Child
- 2 tests to determine lessers: “elements test” & “charging documents test”

Larson, continued

- “elements test” – greater offense must have all elements of lesser offense + at least one additional element; cannot commit greater offense w/o committing lesser.
- Here, greater offense of Continuous Sexual Abuse of a Child may be committed by not only Sexual Conduct w/ Minor, but also Sexual Assault & Child Molestation

Larson, continued

- “charging documents test” – where charging document describes lesser offense, though lesser offense is not always a constituent part of greater offense
- Here, 13-1417(D) controls: other felony sexual offenses may not be charged unless they fall outside time periods of continuous abuse (then not lesser offense), or are charged in the alternative. No alternative charges within this indictment.

Rule 13.3 Duplicitious indictment

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900 (Ct. App. 2009).

- A “duplicitious charge” is one where indictment refers to one criminal act, but multiple acts are admitted to prove the charge.
- Here, evidence of photographing, developing the photos, transporting & possessing the photos was admitted. Photographing & developing are violations of ARS 13-3553(A)(1); transporting & possessing are violation of ARS 13-3553(A)(2).

Rule 13.5(b)

Amendment of charges

State v. Freeney, 223 Ariz. 110, 219 P.3d 1039 (2009).

- Freeney beat the victim, his girlfriend with a metal bar or pipe & threaten to kill her. He was originally charged w/ using deadly weapon to place victim in reas. apprehension of imminent physical injury—changed to intentionally causing a physical injury (because the girlfriend recanted).
- Amendment of charge on first day of trial to change theory of aggravated assault violated Rule 13.5(b)
- Court reviews for harmless error: Freeney not prejudiced as he had notice of the victim's serious injuries & photos, & no other prejudice.

Rule 13.5(c)

probable cause determination

Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210 (2009).

- Rule 13.5(c) grants a defendant in a capital case the right to a probable cause determination regarding alleged aggravating factors, per the procedures in Rule 5 (a preliminary hearing).

Rule 15.1

Disclosure by the State

State ex rel Thomas v. Newell, 221 Ariz. 112, 210 P.3d 1283 (Ct. App. 2009).

- Court may only order disclosure of scientific testing results that have been completed (here, court ordered disclosure of fingerprint testing not yet completed).
- Trial courts cannot make State complete scientific testing; once testing is complete, court may set deadline for disclosure.
- However, in real life deadlines appear to assist both parties with *certain crime labs*.

Rule 15.1(g)

Additional Disclosure by the State

State v. Bernini(Daughters-White II), 222 Ariz. 607, 218 P.3d 1064 (Ct. App. 2009).

- Trial Judge ordered disclosure of Intoxilyzer source codes & software- order reversed & vacated in Daughters-White I.
- Trial Judge's subsequent order for State to produce the software used by the Intoxilyzer 8000 is reversed; defendants failed to establish "substantial need". All claims of software glitches were unconnected to their test results; they seek disclosure "merely in hope that something will turn up." Not sufficient basis for ordering extraordinary disclosure. Reversed again.

Rule 15

Disclosure– “meta data”

Lake v. City of Phoenix, 222 Ariz. 547, 218 P.3d 1004 (2009)--- this is a civil case.

- David Lake, a PPD officer filed an administrative complaint alleging employment discrimination & a public records request for his supervisor's notes, including “meta data”– file information of electronic data containing creation date, access dates, who accessed, and print dates.
- Supreme Court held electronic versions of records, including meta data, is subject to disclosure under Public Records law.

Rule 17

Guilty pleas

Alejandro v. Harrison, 223 Ariz. 21, 219 P.3d 231 (Ct. App. 2009).

- On first day of trial, defendant informed the court he wanted to plead guilty to burglary, unlawful flight & criminal trespass charges (but not to 3 cts of Aggravated Assault). State objected to guilty pleas to less than all of the charges.
- Special Action jurisdiction accepted & relief granted– Defendant has right under Rule 17 to plead guilty to any charge.

Rule 17.2

stipulations are not guilty pleas

State v. Allen, 223 Ariz. 125, 220 P.3d 245 (2009).

- Defendant charged w/ Agg Assault, Disorderly Conduct, Weap Misc., & POM
- Parties stip'd to facts that Defendant was a prohibited possessor & elements of POM
- A stip is not the equivalent of a guilty plea even when to all elements of an offense, and no Boykin colloquy (Rule 17.2) is necessary.

Rule 17.4(f)

State v. Campoy, 220 Ariz. 539, 207 P.3d 792 (Ct. App. 2009).

- Rule 17.4(f) precludes admission of statements made by a Defendant during plea negotiations– this includes a debriefing or “free talk”; however, statements made after the plea is negotiated pursuant to a “truthful-cooperation clause” were admissible in a later trial & not made during plea negotiations.

Rule 17.6

Admission of a Prior

State v. Osborn, 220 Ariz. 174, 204 P.3d 432 (Ct. App. 2009).

- During Osborn's trial on 2 cts Agg Assault, Weapons Misconduct, & PODD, the parties stip'd to fact that Osborn had a prior felony conviction & that he was a prohibited possessor. Trial Judge found one historical prior felony conviction & sentenced accordingly.
- Reversed, because no Rule 17.2 advisement of consequences of admitting in regard to possible enhanced sentences.
- Is this good law in view of Allen?

Rule 17.6

Admission of a Prior

State v. Geeslin, 221 Ariz. 574, 212 P.3d 912 (Ct. App. 2009).

- Defendant had 7 priors. Defendant did not testify at trial, no evidence of the priors was offered, rather Defendant "informally" admitted priors by counsel's admissions.
- Remanded for failure to hold a Rule 17.6 inquiry; the Court finding fundamental error. Trial Court is instructed to determine if Defendant was prejudiced, & if so order new trial on priors.

Rule 19.1

Motion for Mistrial: vouching

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069 (Ct. App. 2009).

- Prosecutor argued “the State is satisfied the burglary with the motor vehicle...” OK, if interpreted as an assertion that sufficient evidence was presented regarding the Burglary charge. OK for attorneys in closing argument to urge the jury to make reasonable inferences, & suggest conclusions. But, personal opinion of prosecutor????
- Prosecutor’s characterization of the Defense argument as an attack on the police, implying that they were trustworthy was a fair comment & response to the Defense argument.

Zinsmeyer, continued

- 2 types of improper prosecutorial vouching, per State v. Palmer, 219 Ariz. 451, 199 P.3d 706 (Ct. App. 2008):
 1. When the prosecutor places the prestige of the government behind a witness;
 2. When the prosecutor suggests that additional unrevealed evidence supports a guilty verdict.

Rule 19.1

Motion for Mistrial/ Juror

State v. Slover, 220 Ariz. 239, 204 P.3d 1088 (CT. App. 2009).

- Excusal of juror on the 4th day of trial for cause was not grounds for mistrial.
- Prosecutor informed court & counsel that her daughter had spent time with the daughter of a juror—they were friends.
- Other jurors told Court that they had not overheard anything(re Juror + prosecutor's kids), or heard anything that would cause them to be partial.
- No error in denying Defendant's Motion for Mistrial.

Rule 19.1

Motion for Mistrial/ Prosecutor

State v. Speer, 221 Ariz. 449, 212 P.3d 787 (2009).

1. Prosecutor told a female defense attorney to be careful about contracting gonorrhea from Defendant. Not made in front of judge or jury- no prejudice to Defendant.
2. Prosecutor's Q to Detective whether Defense counsel was aware that jail recordings of inmate phone conversations were destroyed after 6 months OK to rebut contention of bad faith by police.

Rule 19.1

Motion for Mistrial/ Prosecutor

Speer, continued----

3. Prosecutor's statement in guilt phase closing argument that State had burden "in this phase" of proof beyond a reas. doubt – not error. No secret that capital case might have up to 3 phases since jury was informed of this fact from the beginning of the trial!

Rule 19.1

Motion for Mistrial/victim's family

State v. Kuhs, ___P.3d___, 2010 WL 624016 (Ariz. 2010), trial judge did not abuse discretion in denying Defendant's Motion for Mistrial when victim's stepmother cried audibly during the prosecutor's guilt phase closing argument, and was escorted out of the courtroom.

"We previously have found that more substantial emotional outbursts in the jury's presence did not mandate a mistrial. In State v. Bible (citation omitted), for example, as the father of a murdered girl walked out of the courtroom, he referred to the defendant as "[t]hat f[***]ing asshole" within earshot of the judge and jury."

Rule 20

Motion for Judgment of Acquittal

State v. Jernigan, 221 Ariz. 17, 209 P.3d 153 (Ct. App. 2009).

- Jernigan convicted of 2 counts of Theft of Credit Card & Shoplifting: Defendant caught in Target store by guard who saw Defendant put a car stereo in his pants! Defendant had 2 credit cards belonging to other individuals in his wallet.

Rule 20

Motion for Judgment of Acquittal

Jernigan, continued—

- Jernigan contended that State failed to prove that he “appropriated” the credit cards to own use- he did not use either one.
- “**appropriate**” per 13-1802(A)(4) means that the stolen item is held “...in possession of the Defendant, to the exclusion of the true owner, so that it is capable of use by the Defendant.”
- Possession of 2 credit cards of others for 2 weeks = substantial evidence.

Rule 21.1

Jury Instructions

State v. Fish, 222 Ariz. 109, 213 P.3d 258 (Ct. App. 2009).

- Hiker/Defendant shoots man in woods near Strawberry; victim's dogs attack him.
- Second Degree Murder conviction is reversed because trial judge failed to give Defense' requested instructions defining "unlawful physical force", & statutory elements of crimes of endangerment, threatening or intimidating, & aggravated assault.
- Under appropriate facts, dogs may be considered "dangerous instruments".

Rule 21.1

Jury Nullification

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900 (Ct. App. 2009).

- No right to a jury nullification instruction, so no error in refusing Defendant's request for one.

Rule 27.6

jurisdiction over Petition to Revoke

State v. Chacon, 221 Ariz. 523, 212 P.3d 861 (Ct. App. 2009).

- Probation violation, revocation and sentence reversed & vacated because probation had expired, & court without jurisdiction over Defendant.
- The Petition to Revoke had not been filed with the clerk until after probation expired.

Rule 31

controlling authorities: Div 1 or 2???

State v. Patterson, 222 Ariz. 574, 218 P.3d 1031 (Ct. App. 2009).

- There is no rule requiring that, when trial court is confronted with conflicting opinions issued by different panels of Court of Appeals in divisions 1 and 2, that court must follow opinion from geographical area where trial court is located.
- Trial court should follow opinion that it finds most persuasive.

Rule 31.8(h)

correction of the record on appeal

State v. Diaz, ___ P.3d ___, 2010 WL 476010 (Ariz. 2010), vacating 221 Ariz. 209, 211 P.3d 1193 (Ct. App. 2009).

- Court of Appeals reversed verdicts of First Degree Burglary, Att. Armed Robbery, & Agg. Assault because court reporter omitted the polling of juror #6 & his answer of “yes” to question, “Is this your true verdict?”. Defense contended that only 11 jurors rendered verdict & Defendant denied right to 12 person jury.
- Ct. of Appeals denied State’s Motion for Reconsideration after reporter filed amended transcript containing juror #6’s “yes” answer.

Rule 31.8(h)

correction of the record on appeal

Diaz, continued—

- Supreme Court reversed, finding several references in the record to 12 jurors, and no objections or complaints by anyone that a juror was missing.
- Better procedure: Rule 31.8(h) allows remand to trial court to determine what actually occurred, and appellate court may order sua sponte.

Rule 32.7(informal conf.) Rule Changes

Rule provides that court may hold an informal conference to expedite Rule 32 proceedings.

Amendment, effective 1/1/10, requires informal conference in capital cases, within 90 days after appointment of counsel on the first notice of PCR.

Rule 39(a) Rule Changes

Definition of "victim" in Rule 39 is changed to mirror that statutory definition found in A.R.S. 13-4401(19).